No. 89-1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC.
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF

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April 23, 1990

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Pursuant to Rule 15.7 of the Rules of this Court, Petitioners National Small Shipments Traffic Conference, Inc. and The Health and Personal Care Distribution Conference, Inc. ("Shipper Conferences") file this supplemental brief in order to bring to the Court's attention a new decision, issued April 18, 1990, supporting issuance of a writ of certiorari.

In their Petition and Reply, the Shipper Conferences pointed out that the decision of the Interstate Commerce Commission

in the proceeding below conflicts not only with decisions by federal courts of appeals and district courts, but also with decisions by states outlawing automatic releases in intrastate commerce. Petition at 8 and Reply at 8 n.4. Large numbers of shipments move in both interstate and intrastate commerce in the course of reaching their destination, and shippers are entitled to look to the delivering carrier for compensation for loss or damage, without being required to establish which of several carriers may have caused the loss or damage. See 49 U.S.C. § 11707(a)(1). Tremendous confusion will result if the same shipper act — declining to execute the release form on the bill of lading — leads to diametrically opposed results in interstate and intrastate commerce, producing limited liability under automatic releases in the former, and full liability in the latter.

Because of these interrelationships between transportation within the states and transportation among the states, conflicts between federal law and state law with respect to permissible terms of transportation service in common carriage have severe adverse impacts on the public interest that more clearly warrant review by this Court than is the case where federal and state law conflict in other areas.

Attached as an appendix to this supplemental brief is a copy of the decision of the Court of Appeals for the Third District of Texas, Austin, Texas, in *Common Carrier Motor Freight Association Inc., et al. v. NCH Corporation, et al.*, ____ SW2d ____, No. 3-89-170-CV (Tex. Civ. App. Austin, April 10, 1990.[1] In that decision, the Court of Appeals was called on to decide whether automatic releases in a motor carrier tariff approved by the Railroad Commission of Texas could be recon-

[1]Though not listed as such, these Shipper Conferences were appellees in that case, along with NCH Corporation, a member of National Small Shipments Traffic Conference, Inc.

ciled with Texas Rev. Civ. Stat. Ann. art. 883 (Supp. 1990), the Texas version of the Carmack Amendment.[2]

Affirming a decision by the lower court that reversed the decision of the Railroad Commission of Texas, the Court of Appeals held that "[T]he plain meaning of the language of art. 883 does not empower the Commission to permit the carriers to publish a tariff containing the automatic release of liability provision." Appendix A at A-4. The Court of Appeals went on to reject the argument that the automatic release provisions of the tariff, when combined with a bill of lading which contains no express release,[3] could constitute written agreement by the shipper to limit carrier liability. The Court of Appeals stated (Appendix A at A-5, emphasis in original):

> As previously written, art. 883 plainly provides that the waiver of liability, *itself,* must be a written term in the specific contract. If it is incorporated only through a reference to "tariffs", then it is merely implied in the contract and not a written provision by the shipper.

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[2]A comparison of the terms of art. 883 and its federal counterparts, formerly 49 U.S.C. § 20(11) and currently 49 U.S.C. §§ 10730 and 11707, demonstrates a clear similarity. The relevant text from art. 883 is quoted by the Court of Appeals at A-2-A-3.

[3]The bill of lading used in Texas intrastate commerce is the same as the bill of lading used in interstate commerce. In *Common Carrier Motor Freight Association,* as in the federal cases discussed in the parties' filings in this Court (except for the new 10th Circuit decision cited by the government, *Norton v. Jim Phillips Horse Transportation, Inc.*, No. 88-2630 (10th Cir. Mar. 29, 1990) (1990 U.S. App. LEXIS 4624)), the bill of lading did not state the released value established by the tariff, or inform the shipper that failure to declare a value would lead to limited liability.

Because of the need for uniformity in interstate and intrastate commerce and because of the close parallels between the Texas Motor Carrier Act and the Interstate Commerce Act and between this case and the *Common Carrier Motor Freight Association* case, these Shipper Conferences offer the attached decision as further support for their petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS
AT AUSTIN

No. 3-89-170-CV

COMMON CARRIER MOTOR FREIGHT
ASSOCIATION, INC., ET AL.,
APPELLANTS

VS.

NCH CORPORATION, ET AL.,
APPELLEES

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
261ST JUDICIAL DISTRICT NO. 408,561,
HONORABLE HUME COFER, JUDGE PRESIDING

Appellants Common Carrier Motor Freight Association, Inc. (carriers) and the Railroad Commission seek to set aside the judgment of the district court of Travis County. By its judgment, the district court overturned the Commission's order directing the issuance of tariffs that would limit the liability of carriers for damage done to freight in their possession. Appellees are several shipper associations (shippers). This Court will affirm the judgment.

The Commission's order directed the carriers to issue and publish Tariff 500. The relevant part of Tariff 500, the so-called

"automatic release" provision, provides that the carrier's liability for damaged cargo is limited to fifty dollars per shipment unless the shipper declares in writing before tender a higher value for the cargo. The automatic release provision of Tariff 500 reversed the common law rule that the carrier is responsible for the total damage to cargo. Southern Pac. Ry. Co. v. Maddox, 12 S.W. 815, 817 (Tex. 1889).

The shippers contended in district court that the automatic release of liability provision was contrary to Tex. Rev. Civ. Stat. Ann. art. 883 (Supp. 1990). The district court agreed and concluded that the Commission's order sanctioning the automatic release of liability provision was in excess of the Commission's authority because it purported to limit the carrier's liability in the absence of the shipper's written consent.

On appeal, appellants challenge the district court's conclusion that art. 883 prohibits the Commission's adoption of the automatic release provision. In support of their challenge, appellants claim (1) that art. 883, read in conjunction with Tex. Bus. & Com. Code Ann. § 7.309 (1968), authorizes the automatic release of liability, and (2) that because all tariffs are incorporated by law into the contract between the shipper and carrier, the automatic release of liability is, indeed, a part of the written agreement as contemplated by art. 883.

Texas Rev. Civ. Stat. Ann. art. 882 (1964), provides that carriers be held liable as they are at common law, except as otherwise provided. Article 883 sets forth the one exception to this rule:

> . . . [p]rovided, however, that the provisions hereof respecting liabilities of carriers as it exists at common law for loss, damage, or injury to . . . goods, wares, and merchandise shall not apply to property received for transportation concerning which the carriers shall have been or shall hereafter be expressly

> authorized or required by order of the Railroad Commission of Texas to establish and maintain rates dependent upon the value declared in writing by the shipper of the property or agreed upon in writing as the released value of the property, in which case, such declaration or agreement shall have no effect other than to limit liability and recovery to an amount not exceeding the value so declared or released, and so far as relates to values, shall be valid and is not hereby prohibited. . . .

Section 7.309(b) provides:

> Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use.

Application of § 7.309 to the tariff provision in this appeal, however, is governed in turn by Tex. Bus. & Com. Code Ann. § 7.103 (1968) which expressly provides that provisions in Chapter 7 of the Code are made subject to regulatory statutes. Accordingly, § 7.309 is subject to the terms of art. 883. Section 7.309, then, cannot authorize limitation of carrier liability in contravention of art. 883.[1]

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[1]Appellants rely upon Elizabeth-Perkins, Inc. v. Morgan Exp., Inc., 554 S.W.2d 216 (Tex. Civ. App. 1977, no writ). We recognize that the tariff in *Elizabeth-Perkins* was substantially similar to the tariff at issue here. However, the court in *Elizabeth-Perkins* was not called upon to address the validity of the tariff, but instead to examine the effect of the tariff on a particular claim. The opinion in *Elizabeth-Perkins* does not support the proposition that § 7.309 may abrogate a statutory constraint on what may be included in a tariff; rather, it only concerns the effect of § 7.309 on a specific question regarding a presumably valid tariff.

Contrary to appellants' suggestion, this Court does not regard art. 883 to be ambiguous. Article 883 expressly provides that, in general, the common law rule of carrier responsibility applies. At common law, the carrier is fully liable for all damage to cargo in its possession under circumstances that impose an obligation. *Southern Pac. Ry. Co.*, 12 S.W. at 817. Nevertheless, the legislature in art. 883 provided one exception: only a written exception on the bill of lading will release the carrier from full liability (a carrier may "establish and maintain rates dependent upon the value declared in writing by the shipper").

The legislative intent *as expressed in the statute* must be given controlling importance. Citizens Nat. Bank v. Calvert, 527 S.W.2d 175, 180 (Tex. 1975). An agency construction of the statute must, of course, be consistent with the statutory wording and only in those instances in which the plain meaning of the statute works an absurdity may it be disregarded. *Id.* at 180.

In sum, this Court concludes that the plain meaning of the language of art. 883 does not empower the Commission to permit the carriers to publish a tariff containing the automatic release of liability provision.

Appellants' second argument concerns whether a tariff may be considered a "writing" within the meaning of art. 883. A bill of lading generally expresses that it is "subject to the provisions of governing tariffs." Regulations and tariffs promulgated and approved by the regulating agency coupled with the bill of lading constitute the contract between the shipper and the carrier. *See* Railway Exp. Agency, Inc. v. Ferguson, 242 S.W.2d 462, 464 (Tex. Civ. App. 1951, writ dism'd); Continental Transfer & Storage Co. v. Swann, 278 S.W.2d 413, 415 (Tex. Civ. App. 1954, writ dism'd); *see also* Modern Whsle. Florist v. Braniff Int. Airways, Inc., 342 S.W.2d 225, 227 (Tex. 1960). Appellants suggest that the bill of lading along

with the automatic release provision adopted by Tariff 500 constitutes a "written agreement" pursuant to art. 883. This Court does not agree.

As previously written, art. 883 plainly provides that the waiver of liability, *itself,* must be a written term in the specific contract. If it is incorporated only through a reference to "tariffs," then it is merely implied in the contract and not a written provision by the shipper.

Appellants' points are overruled.

The judgment of the district court is affirmed.

Bob Shannon, Chief Justice

[Before Chief Justice Shannon, Justices Carroll and Aboussie; Justice Carroll not participating]

Affirmed
Filed: April 18, 1990
[Publish]